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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN RICHARD DEMERY, Defendant and Appellant.	E068216 (Super.Ct.No. SWF1403153) OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso, Judge. Affirmed in part; reversed in part.

Bobbitt, Pinckard & Fields and Richard L. Pinckard for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In the early morning hours of November 8, 2014, defendant and appellant, John Richard Demery, shot and killed Adam Thomas after a confrontation over reckless driving in their neighborhood. A jury convicted defendant of second degree murder and found that he had personally and intentionally discharged a firearm, proximately causing Thomas's death. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (a), (d).)[1] The court sentenced defendant to 40 years to life in prison, consisting of 15 years to life for the substantive offense and another 25 years to life for the firearm enhancement. (§§ 190, subd. (a), 12022.53, subd. (d).)

Defendant advances numerous arguments on appeal. He charges the court with instructional errors relating to self-defense, imperfect self-defense, and the failure to give proposed pinpoint instructions on other topics. In addition, he asserts that the court committed evidentiary errors in excluding evidence of Thomas's purported gang membership, excluding evidence of Thomas's traffic-related bench warrants, excluding certain demonstrative exhibits (cardboard cutouts of defendant and Thomas), and admitting evidence of defendant's blood-alcohol level. He also argues that there is no substantial evidence supporting the jury's implied finding that he did not act in self-defense or imperfect self-defense. Lastly, he contends that he should benefit from recent

[1] All further undesignated statutory references are to the Penal Code.

amendments to the firearm enhancement statute (§ 12022.53), and we must remand for the court to decide whether to strike that enhancement.

We reject his instructional, evidentiary, and substantial evidence challenges. We agree, however, that we should reverse and remand his sentence on the firearm enhancement, in light of recent amendments to section 12022.53, and give the court the opportunity to exercise its newly granted discretion to strike that enhancement. We therefore reverse his sentence on the firearm enhancement, but affirm in all other respects.

II. FACTS

A. *Prosecution*

In November 2014, brothers Aaron and Christopher Walters had been living down the street from defendant for three months.[2] Other family members lived in the Walters' house, as well as Thomas, who was Aaron's longtime best friend and a close family friend. Thomas had just moved in days before the shooting.

Defendant was a United States Border Patrol agent. Just after midnight on November 8, 2014, he called 911 and reported a car doing "burnouts" down the street from his house. The dispatcher asked if he had seen the car's license plate, but he had not. He told the dispatcher that he was law enforcement and he was outside with his shotgun. The dispatcher asked why he was outside with his shotgun, and he replied, "Because he's been drivin' up and down the street, and I've been outside" and "obviously

[2] For clarity's sake, we will refer to the Walters brothers by their first names.

he doesn't give a shit." The dispatcher transferred him to the sheriff's department, and he again reported that a car was doing burnouts down the street, but said that he was outside with his off-duty weapon, not a shotgun. He explained that he was an off-duty border patrol agent. This second dispatcher asked again if he had seen the car's license plate number and why he was outside with a weapon. Defendant explained his conduct by saying that there had been a rash of burglaries in the neighborhood. The dispatcher said that she was sending a deputy out and asked if defendant was going to go inside and put his weapon away. He replied that he would. Fifteen to 20 minutes later, he was outside smoking and heard a car doing burnouts again. This time, he saw that it was a truck parked down the street. He decided to go look at the truck's license plate number and put a gun (a Ruger .380) in the pocket of his shorts. He also took a flashlight with him.

Christopher and a friend, Nicholas Ruybal, were in Christopher's garage working on a car. Thomas was also in the garage, sitting on a couch and looking at his phone. Thomas had consumed "a few drinks" that night and appeared "buzzed" but not drunk. He was able to walk straight and was not slurring his speech. He had parked his truck next to the curb in front of the house. Thomas's father had gifted him the truck. He was sensitive to people snooping around it or looking at it. The truck was his only means of transportation, and he was interviewing for jobs.

Ruybal and Christopher noticed a light in front of the house and walked out of the garage to find defendant taking a picture of the front of Thomas's truck. Christopher asked defendant who he was and why he was around the truck. Defendant walked up the

driveway to them and kept his flashlight trained on their faces so that they could not see him. He responded that he was a federal officer and it did not matter what he was doing there. Defendant gave Christopher an uneasy feeling, but Christopher held out his hand to shake, told him they were neighbors, and asked him to "sit down [and] talk about it." According to Christopher, defendant said that he did not care if they were neighbors, and he called them "[W]hite trash." He was very insulting and accused them of being loud and keeping their house in terrible shape, and he said that he hated being outside because of them. Christopher responded by trying to be nice so that he could calm defendant down. He asked defendant to get the flashlight out of his face, but defendant refused, saying he was law enforcement and he was going to do as he wanted. According to Ruybal, defendant was hostile and angry; he told them that they had ruined the neighborhood and called them "scum bags," "pieces of shit," and "trash." Ruybal did not say anything during this interaction because he was terrified.

Around this time, Thomas came out of the garage and stopped next to Christopher. He asked defendant, "'Who the fuck are you?,'" and asked why he was there, and when defendant said that he was a federal officer, Thomas said that he did not "'give a shit.'" Defendant backed down the driveway; Thomas repeatedly asked who he was and why he was by the truck, and defendant kept repeating that he was law enforcement and it did not

matter why he was there.[3] It did not appear to Christopher that Thomas was afraid of defendant; he was, instead, protective of and concerned about his truck.

After several minutes of back and forth movement and talk between defendant and Thomas, they had moved into the street, and Christopher tried to persuade Thomas to turn around. He told Thomas three or four times to "let it be" and they would go back to the garage. The two of them turned around multiple times, and before they could leave every time, defendant would take steps towards them, and the confrontation would continue. Christopher did not feel comfortable turning their backs towards defendant in that situation. He could not recall all the words exchanged between defendant and Thomas, but at some point, both men used obscenities. Thomas twice asked defendant something like, "'Who the F are you[?] You aren't leaving us alone. Like, what do you want from us?,'" and "'[W]hat the fuck are you doing here[?]'" Each time defendant reiterated that he was a federal officer. He also said that he needed to take pictures of the truck because Thomas was doing burnouts, and he was "causing the neighborhood to go down."

Ruybal heard defendant twice threaten to shoot Thomas if he came closer, and Thomas responded with something like, "'I don't give a fuck. If you're going to shoot, shoot me motherfucker,'" and he put his hands up in the air about shoulder height.

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[3] Christopher thought defendant started backing up when Thomas joined the conversation because Thomas was "not a 17-year-old teenager," while Christopher was only 17 years old at the time. But Christopher acknowledged that, at six feet, he was taller than Thomas, had a beard, and appeared older than his age. He initially estimated Thomas was about five feet eight inches tall. After defense counsel showed him a cardboard cutout of Thomas, he acknowledged that Thomas was taller than that. In actuality, Thomas was five feet 10 inches tall and weighed 193 pounds.

Christopher did not recall defendant warning Thomas that he would shoot. Defendant kept the flashlight in their eyes, but Christopher saw the "shimmer" of something in his hand that Christopher believed to be a gun.

Christopher finally tried to pull Thomas away from defendant by grabbing Thomas's arm, but Thomas shrugged Christopher off and stumbled two or three steps forward. Almost simultaneously, Christopher heard a click that sounded like the hammer of a gun. He tried to grab Thomas again and briefly caught his shirt before losing hold of it, and defendant opened fire on Thomas. Christopher estimated that he heard three gunshots, and defendant then said something mocking along the lines of, "'How are you going to fight me now?,'" or "'Let's see you fight now,'" before firing a second series of shots. Christopher estimated there were seven to eight shots total. Thomas fell to the ground after the first three shots. Ruybal heard three shots, a pause, and defendant say, "Try and fight now, motherfucker," and then three more shots. At least two of the Walters' neighbors also heard three shots, a pause, defendant say something like, "'Let's see you fight now,'" or "'Try and fight now, motherfucker,'" and then a few more shots. During this whole confrontation between the two men, Thomas never verbally threatened defendant and never attempted to strike him. Thomas's hands were either hanging down in front of him, or he had his thumbs hooked in his pockets. Ruybal thought Thomas looked like he would throw a punch at one point, but he never made any movement to do that.

After the shots, Christopher ran inside and woke Aaron. When Aaron and Christopher came back outside, defendant was standing over Thomas with his gun still drawn and a phone to his ear. Thomas was screaming that he was dying and could not feel his legs. Defendant was talking to someone on the phone and reporting that he had just shot a man. As Aaron walked towards Thomas, defendant pointed his gun at Aaron and threatened to shoot him if he came closer. Aaron was angry and told him "to go ahead and shoot." Defendant backed away into a neighbor's driveway, and Aaron was able to reach Thomas. Thomas continued to scream and moan for help. Defendant was threatening to shoot anyone who came closer. By this time, at least seven people were outside, including Aaron, Christopher, Ruybal, three other residents of the Walters' house, and the neighbor.

The first officer to arrive on the scene found defendant standing in the neighbor's driveway between two cars. He had a strong odor of alcohol emanating from him. Defendant told officers that he had consumed one beer while he was cooking dinner and another with dinner at around 8:00 p.m. (approximately four hours 45 minutes before the shooting). Investigators found an open beer can on his counter, a beer can in his kitchen trash, and three empty beer cans in his garage refrigerator.

Defendant's blood sample was collected approximately five hours after the shooting. At that time, he had a blood-alcohol level of 0.13 percent. A blood-alcohol level of 0.08 percent is considered impaired or under the influence for purposes of driving. Symptoms of alcohol impairment or intoxication include lowered alertness, loss

of judgment, altered mood, release of inhibition, exaggerated behavior, bloodshot or glassy eyes, loss of muscle coordination and balance, sleepiness or tiredness, and slurred speech. But the symptoms vary at different levels and from person to person, depending on a person's experience with alcohol.

Thomas's blood sample was collected approximately six hours after the shooting, and he also had a blood-alcohol level of 0.13 percent. His urine sample also tested positive for marijuana.

Forensic tests indicated defendant's gun muzzle was anywhere from three inches to 72 inches (six feet) from Thomas when the shots were fired. Investigators recovered six cartridge casings and one bullet from the scene of the shooting. Thomas had five gunshot wounds to the abdomen and one exit wound, and the forensic pathologist recovered four bullets from his body. The gunshot wounds caused his death.

A border patrol agent, Jeremy Schappell, testified about border patrol training. Agents are trained to illuminate subjects with a flashlight during a stop because, among other things, it gives agents a position of advantage—they can see the subject, but the subject cannot see them. They are also trained to de-escalate volatile situations. Yelling and cursing at someone who was being conciliatory would not be considered a de-escalation technique and would be contrary to agents' training. Even off-duty agents are expected to maintain a level of professional decorum with the public that would not include berating and insulting people. Agents are permitted to carry weapons while off duty, but they are not supposed to carry a firearm while under the influence of alcohol,

and they are not supposed to use their professional title when acting off duty. If an agitated person were walking towards Schappell unarmed, he opined that he would not yell at the person and threaten to shoot him or pull out a gun. He would try to de-escalate the situation and use other force options if necessary. Agents are trained in nonlethal force options, including strikes with the fists, knees, and elbows on different pressure points.

B. *Defense*

Defendant did not testify at trial, but his account of the events came from his interview with officers on the day of the shooting. In November 2014, he thought his neighborhood had been "going south." He had "seen the traffic that [came] out of that house" where Thomas's truck was parked, and something told him to take his gun when he went to look for the license plate, "just in case." He had purchased a shotgun because of that house. Renters had moved into it approximately two months before, and a lot of vehicles had been coming and going from there. He noticed there were off-road vehicles and speculated that they might have "off road people" there. He described them to the officers as "[W]hite trash." He did not think that the people coming and going from that house were "on the up and up."

When he got to the truck and was shining his flashlight on it, one of two guys in the garage asked him what was going on. From the middle of the street, defendant replied that someone was doing burnouts in the truck. He said that he was law enforcement, and "'[t]his shit needs to stop.'" The conversation was friendly. The guy

indicated that he understood and would tell the owner of the truck to stop. The guy was calm and apologetic. Defendant was backing up to leave when Thomas came running "out of nowhere" and confronted him. Defendant is approximately five feet six inches tall. He estimated Thomas was an inch or two taller. He could not tell whether Thomas was big or muscular because of the darkness. He was using his flashlight to illuminate Thomas's chest and face only. He looked "[p]issed off."

Thomas said, "'Hey mother fucker, what do you want[?]'" The guy from the garage tried to grab Thomas and stop him, but he knocked the guy off and kept "coming—coming—coming" aggressively, and defendant was "backing up, backing up, backing up." Thomas clenched his fists, and defendant thought that Thomas was going to punch him. He was also afraid that he was going to trip as he was backing up because he was in flip flops, and then Thomas would get the best of him. Defendant took his gun out of his shorts and told Thomas to back up, and that he was a federal agent, but Thomas said, "'I don't give a shit.'" Thomas kept coming, and defendant "racked" his gun. Still, Thomas continued to walk towards him and did not seem to care that defendant had a gun. Thomas was "cussing the whole time," asking what was his "fucking problem," and why did he care about the truck. Thomas was about two feet from him when he decided to fire because he feared for his life. He figured that if he did not, Thomas would punch him, take his gun, and shoot him. When the officer asked him why he did not run, he explained: "I probably could have. But with my gun in my hand. All he had to do was trip me from behind. Or punch me in the back of my head as I'm running. I'm in flip

flops. He was in boots and so . . . ." Instead, defendant fired until Thomas fell to the ground "to stop the threat." After that, people started coming out of the house, and defendant retreated to the neighbor's driveway.

Defendant's expert in firearm forensics observed the testing conducted by the prosecution's expert, who concluded that the gun's muzzle was anywhere from three inches to six feet from Thomas when the shots were fired. Based on information made available after the testing, the defense expert concluded the muzzle-to-target distance was anywhere from one to four feet, and most likely two to four feet.

Richard Henry—who had a combined 36 years of experience as a police officer, homicide detective, and district attorney investigator—analyzed the cases and reconstructed the shooting for the defense. Henry reviewed all the law enforcement and investigative reports relating to the shooting. He recreated the position of the cartridge casings and bullet found on the street. He started with the measurements taken by the sheriff's department forensic technician, but quickly discovered that they were inaccurate. The equipment that the technician had used to measure the position of the evidence was "off"; typically, the equipment is calibrated every six months, and in this case, it had not been calibrated for almost a year. Henry reconstructed the placement of the casings and bullet by looking at photographs of the crime scene and using the cracks and rock formations in the asphalt to find the positions of the evidence. The process had him down on his hands and knees in the street and took him six to seven hours. Using this reconstruction, data from other forensic experts, and witness statements, Henry

conducted an "ejection pattern analysis," which told him where defendant was positioned while shooting. He concluded that defendant shot three times then moved about two feet left and shot another three times, both positions being one to four feet from Thomas. Based on the wound paths established during the autopsy, Henry concluded that Thomas was leaning forward when he sustained the first three shots, was upright when he sustained the fourth shot, and was falling slightly backward when he sustained the fifth shot. (The sixth shot missed Thomas.)

Jeffrey Martin—a former police officer with over 28 years of experience—testified as defendant's use-of-force expert. Among other things, he talked about the process of "sizing up" a potential threat, identifying the aggressor and defender in confrontations, pre-assault indicators, and the ways a defender might try to de-escalate a confrontation. For instance, retreating from a confrontation or telling the aggressor that you are law enforcement could be attempts to de-escalate, as could producing a gun after those two things did not work. If a law enforcement officer produces a gun and says, "'Stop or I'll shoot,'" and the aggressor tells the officer to shoot, it is either a "suicide by cop situation," or the aggressor thinks the officer is bluffing. In the latter case, the aggressor could be trying to take the officer's gun and do harm with it. Martin also testified that a single punch can cause serious injury or even death; "punch homicides" can occur when the victim falls and hits his or her head on the pavement. In evaluating the proportionality of force used by two combatants, Martin "absolutely disagree[d]" that fists would never justify a response of deadly force. An analysis of whether force is

reasonably proportionate is necessarily context specific, and deadly force could be a reasonable response to fists, depending on other factors.

III. DISCUSSION

A. *Challenges to the Jury Instructions*

Defendant contends that the court made a series of errors relating to jury instructions, including: (1) the court's failure to define language in the imperfect self-defense instruction (CALCRIM No. 571), as well as its response to a jury question about the same instruction; (2) the court's omission of certain language from the self-defense instruction (CALCRIM No. 505); (3) its decision to instruct on contrived self-defense (CALCRIM No. 3472); and (4) its rejection of proposed pinpoint instructions on alcohol impairment and witnesses willfully altering evidence. Defendant maintains that these various errors rose to the level of an unconstitutional deprivation of his right to present a defense. Asserted errors in jury instructions are questions of law that we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) Applying this standard, we take each contention in turn and find no reversible error.

1. Imperfect Self-defense Instruction (CALCRIM No. 571)

Defendant argues that the imperfect self-defense instruction was an incomplete statement of the law because it failed to define the term "wrongful conduct," which was subject to multiple interpretations. According to him, the court compounded the problem when it responded to a jury question by "mudd[ying] the waters," instead of defining the term according to its technical legal meaning. We disagree. The court properly

responded to the jury question by clarifying what qualified as "wrongful conduct" on the particular facts of this case.

(a) *Relevant Background*

The court instructed the jury with the pattern instruction on imperfect self-defense, CALCRIM No. 571, which reduces a killing from murder to voluntary manslaughter. The instruction generally told the jury that defendant acted in imperfect self-defense if he "actually believed that he was in imminent danger of being killed or suffering great bodily injury," and he "actually believed that the immediate use of deadly force was necessary to defend against the danger," but at least one of those beliefs was unreasonable.

At the prosecution's request and over defendant's objection, the court used a bracketed sentence in the pattern instruction stating: "Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created the circumstances that justify his adversary's use of force." During deliberations, the jury sent a note requesting that the court explain this sentence. Before the court could respond, it received another note from the jury saying that the jurors were "at an impasse"; some of them agreed on second degree murder, while others agreed on voluntary manslaughter.

The court and the parties discussed a proposed response to the request for an explanation. The court decided that it had "to give them some guidance as to when Mr. Thomas would be legally justified in resorting to self-defense against the defendant."

The court felt that the only scenario in which defendant created circumstances to justify Thomas's use of force would be if it were "a self-defense situation" on Thomas's part. After conferring with the parties, the court told the jury that it was going to "clarify some of the law a little more specifically" and ask them to deliberate further. The court then instructed the jury as follows:

"Self-defense and imperfect self-defense are not available to the defendant if his conduct creates circumstances where Mr. Thomas was legally justified in resorting to self-defense against the defendant. Mr. Thomas had a right to act in lawful self-defense under the following circumstances:

"One, Mr. Thomas reasonably believed he or another person was in imminent danger of suffering great bodily injury or being unlawfully touched;

"Two, Mr. Thomas reasonably believed that the immediate use of force was necessary to defend against the danger; and

"Three, Mr. Thomas used no more force than was reasonably necessary to defend against the danger.

"Although the defendant may not have had the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force as described in CALCRIM [No.] 3472, or, if Mr. Thomas was legally justified in resorting to self-defense, the defendant may defend himself with deadly force if Mr. Thomas escalated the quarrel with his use of deadly force or force likely to produce great bodily injury.

"Please refer to all instructions as a whole, including CALCRIM [Nos.] 505 and 571, regarding self-defense and imperfect self-defense."

After reading this, the court asked the jury foreperson whether there were any further comments. The foreperson said that the jurors just wanted clarification on the one sentence they had identified in the note. The court responded: "I think I clarified that. If you read what I just read to you, the first paragraph I read essentially describes what the *wrongful conduct* would be on the part of the defendant; that is, by creating circumstances where Mr. Thomas was legally justified in resorting to self-defense against the defendant. So, I think that's as clear as I can make it, that the wrongful conduct on the part of the defendant isn't just any conduct. It has to be conduct that led to Mr. Thomas being legally justified in resorting to self-defense." (Italics added.) The court noted that some of the jurors were "shaking [their] head[s]" as if they were "understanding the connection" and sent them back to the jury room.

(b) *Analysis*

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) We assume that the jurors are intelligent and capable of understanding and correlating all the instructions the court gave them. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Where instructions are reasonably susceptible to an

interpretation that supports the judgment rather than defeats it, we should so interpret the instructions. (*Ibid.*)

The sentence that the jury asked about comes from *In re Christian S.* (1994) 7 Cal.4th 768. The question presented by *In re Christian S.* was whether the Legislature had abrogated the imperfect self-defense doctrine when it amended the Penal Code to eliminate the diminished capacity defense. (*Id.* at p. 771.) In the course of defining imperfect self-defense, the court observed: "It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense." (*Id.* at p. 773, fn. 1.)

Defendant maintains that "wrongful conduct" has a distinct legal meaning that the court should have used in responding to the jury question, namely, the "initiation of a physical assault or the commission of a felony." He further argues that the court "muddied the waters" with its response to the jury, particularly because the response removed "wrongful" from the equation. He contends removing "wrongful" meant that

any of his conduct leading up to the shooting could preclude the jury from finding that he acted in imperfect self-defense, and the omission of the term effectively lowered the prosecution's burden of proof. We reject these arguments.

The *In re Christian S.* court's use of "e.g." to introduce "the initiation of a physical assault or the commission of a felony" signifies that assaults and felonies are merely examples of conduct that give rise to the wrongful conduct limitation—not an exclusive and technical definition of wrongful conduct. The same may be said of the court's use of "[f]or example" to introduce its hypothetical, the fleeing felon and the pursuing police officer. This is merely one instance in which the wrongful conduct limitation may apply, and there are other instances. The court was not compelled to use examples in instructing the jury, particularly where they did not apply to this case.

Defendant takes particular issue with the first sentence of the court's response, but it is a correct statement of the law. The court's response began: "Self-defense and imperfect self-defense are not available to the defendant if his conduct creates circumstances where Mr. Thomas was legally justified in resorting to self-defense against the defendant." The trial court did not lift this sentence from thin air. It comes from *People v. Vasquez* (2006) 136 Cal.App.4th 1176, in which the court reasoned: "Imperfect self-defense does not apply if a defendant's conduct creates circumstances where the victim is *legally* justified in resorting to self-defense against the defendant." (*Id.* at p. 1179, citing *In re Christian S., supra,* 7 Cal.4th at p. 773, fn. 1.) It is true

enough that this statement of the law uses "conduct" as opposed to "wrongful conduct." But this is because the inquiry is focused not on whether the defendant's conduct was wrongful, but on whether that conduct created a situation where the victim was "*legally* justified" in using self-defense. (*People v. Vasquez*, *supra*, at p. 1179.) If so, imperfect self-defense is not available to the defendant. Insofar as the instruction correctly states the law, we can hardly say the court erred by responding in this manner. (See *People v. Jones* (1971) 19 Cal.App.3d 437, 447 ["[E]xtracts from appellate opinions [in jury instructions] are deemed to be correct statements of the law."].)

Instead, the court properly tried to clarify its original instruction by making it more responsive to the evidence before the jury. It is not as though this case fits the *In re Christian S.* example of the fleeing felon shooting the pursuing police officer. Defendant had not recently committed a felony and Thomas was not a police officer in pursuit. As the court seemed to recognize, the only situation in which this instruction might apply was if defendant acted in such a way that justified Thomas pursuing him in self-defense. Hence the court's response also explained when Thomas would have a right to act in lawful self-defense against defendant.

Moreover, removing the word "wrongful" did not permit the jurors to find that *anything* he did leading up to the shooting precluded imperfect self-defense. He focuses on this omission and the single sentence in isolation, rather than on the court's response as a whole. This he may not do. (*People v. Dieguez*, *supra*, 89 Cal.App.4th at p. 276.) The court did not tell the jury that any conduct at all by defendant precluded imperfect

self-defense—it was any conduct that caused Thomas to reasonably believe he was in imminent danger of great bodily harm or unlawful touching. Or, as the court expressly told the jurors after reading its supplemental instruction, "the wrongful conduct on the part of the defendant isn't just any conduct. It has to be conduct that led to Mr. Thomas being legally justified in resorting to self-defense."

Defendant lastly argues that there was no evidence that Thomas was engaged in self-defense or felt the need to defend himself against defendant, and the court's supplemental instruction was thus without any factual basis. We cannot agree with defendant's narrow view of the evidence. The accounts from Christopher, Ruybal, and defendant about the events leading up to the shooting differed slightly on some details and significantly on other details. That is to say, the evidence was conflicting in many respects. Defendant focuses on the evidence favorable to his argument while ignoring other evidence that supported Thomas's acting in self-defense. He maintains that the evidence showed that Thomas was not afraid of defendant, Thomas was concerned only about his truck and not about his or his friends' safety, and if anything, Thomas was trying to provoke defendant. But the evidence also showed that when Christopher and Thomas turned around multiple times to leave, defendant would pursue them, such that Christopher said he did not feel comfortable turning his back on defendant, and defendant introduced deadly force into the confrontation by pulling the gun on Thomas. The jury could have reasonably inferred that when Thomas either stumbled or walked toward defendant right before the shots rang out, it was because he was trying to stop defendant

from shooting him or Christopher. This was an issue for the jury to decide, based on all the conflicting evidence.

2. Self-defense Instruction (CALCRIM No. 505)

Defendant contends that the court erred in two respects when it came to the self-defense instruction, CALCRIM No. 505: The court declined to add robbery as a justification for resort to self-defense against Thomas, and the court declined to use language that allowed defendant to rely on information that was untrue. We also reject these arguments.

(a) *Relevant Background*

The court instructed the jury, in pertinent part, that defendant acted in lawful self-defense if he "reasonably believed that he was in imminent danger of being killed or suffering great bodily injury," he "reasonably believed that the immediate use of deadly force was necessary to defend against that danger," and he "used no more force than was reasonably necessary to defend against that danger."

The pattern instruction contains optional language for the first prong, namely, that the defendant reasonably believed he "was in imminent danger of being (raped/maimed/robbed/_____ <*insert other forcible and atrocious crime*>)." (CALCRIM No. 505.) Defendant requested that the court add defendant's reasonable belief that he was in imminent danger of being robbed as a justification for resort to self-defense. Defense counsel argued that there was evidence that defendant "[f]ear[ed] that he was going to be disarmed, forcibly disarmed, and the weapon . . . would be taken away

from him through force or fear and then be used against him." He asserted that if defendant was "dispossessed of his gun by force or fear, that would be robbery." The court declined to add robbery to the instruction. It reasoned that "the context of [defendant] fearing the gun would be taken wasn't that it would be taken and stolen from him but that it would be used on him." The court concluded that there was no evidence that defendant believed Thomas intended to permanently deprive him of the gun; rather, his statements to the officers indicated that he feared Thomas would disarm and violently assault him, causing death or great bodily injury.

The pattern instruction also contains this optional paragraph: "The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true. " (CALCRIM No. 505) Defense counsel argued that the court should include this language. He said that defendant could have reasonably believed Christopher was trying to prevent Thomas from doing harm when he attempted to restrain Thomas, even if this was untrue and Christopher was actually trying to protect Thomas from getting harmed. The court also declined to use this optional language. It ruled that the instruction's reference to "information" meant "strictly . . . oral or written threats"—i.e., information that defendant may have received "from some other source as to whether or not he's being threatened," as opposed to defendant's own perception of "actual events that are occurring that moment."

(b) *Analysis*

"A trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. [Citations.] . . . '[U]nsupported theories should not be presented to the jury.'" (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) On review, we likewise ask whether substantial evidence supported the requested instruction. (*People v. Mentch* (2008) 45 Cal.4th 274, 288.) Evidence is substantial if it permits a reasonable jury to find in accordance with the defendant's theory under the proper standard of proof. (*People v. Flannel* (1979) 25 Cal.3d 668, 684.) In determining the substantiality of the evidence, the court should not weigh the credibility of witnesses, as that is exclusively the jury's role. (*Ibid.*) The court should resolve doubts as to the substantiality of the evidence in favor of the defendant. (*Id.* at p. 685.)

But "[t]here is no error in a trial court's failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial. As long as the trial court has correctly instructed the jury on all matters pertinent to the case, there is no error. The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given." (*People v. Dieguez*, *supra*, 89 Cal.App.4th at p. 277.)

The law of justifiable homicide based on self-defense permits killings to defend against death or great bodily injury, but also to defend against a few "forcible and atrocious" felonies, including robbery. (*People v. Ceballos* (1974) 12 Cal.3d 470, 477-478.) Robbery is "the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear . . . ." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 34, citing § 211.) Although the required specific intent is often described as the intent to permanently deprive the owner of property (*People v. Marshall*, *supra*, at p. 34), the requirement may also be satisfied by "'the intent to deprive [the owner of the property] temporarily but for an unreasonable time so as to deprive the [owner] of a major portion of its value or enjoyment.'" (*People v. Aguilera* (2016) 244 Cal.App.4th 489, 500; see also CALCRIM No. 1600 [optional language defining the required intent as the intent "to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property."].)

The court in *Aguilera* applied this broader definition of the required intent. It held that substantial evidence supported the defendant's robbery conviction for taking his wife's cell phone "to prevent [her] from calling the police in the midst of his violent assault on her." (*People v. Aguilera*, *supra*, 244 Cal.App.4th at p. 501.) The court concluded "[t]hat evidence was certainly sufficient to prove that the defendant took the phone with the intent to deprive [his wife] of it temporarily, but for an unreasonable period of time so as to deprive her of a major portion of its value or enjoyment. As the

prosecutor aptly observed in argument to the jury, calling 911 for help during a violent assault is probably 'the most important call you could make,' and defendant's taking the phone from [her] under those circumstances undoubtedly deprived her of a major portion of the value or enjoyment of the phone." (*Id.* at pp. 501-502.) The court did not say how long the defendant had possessed his wife's phone, only that he left the scene of the dispute with the phone, and officers located him a block away. (*Id.* at p. 494.)

In this case, even if reasonable jurors could find that a temporary taking of defendant's gun constituted robbery, the court did not err in refusing to add robbery to the self-defense instruction. Defendant told officers that he feared Thomas was going to forcibly disarm him and then shoot him with his own gun. He asserts that a reasonable jury could have inferred the required intent because "once dead, [defendant] would certainly be deprived of a major portion of the value or enjoyment of" the gun. We might phrase it more along the lines of the court in *Aguilera*. If the jury credited defendant's stated belief that Thomas was intent on disarming him and using the gun against him, then having a gun in that circumstance was important to fight off Thomas, and taking the gun would have deprived defendant of a major portion of the gun's value in that moment. At least, we assume for the sake of argument that reasonable jurors could have concluded this temporary taking amounted to robbery.

Notwithstanding, the court did not need to add robbery to the instruction because, as given, it already subsumed defendant's theory. Defendant did not say that he feared a simple robbery was imminent, and there was no evidence Thomas intended to take the

gun and simply abscond with it. Instead, defendant said that he feared a taking in which Thomas would use his stolen property to shoot him. On these facts, the purported robbery would be part of an indivisible course of conduct, the objective of which was to kill or cause great bodily harm to defendant. The court instructed the jurors that a fear of death or great bodily injury could be a predicate for self-defense. Instructing them that robbery could also be a predicate would have been superfluous, at least on this record.

Assuming there was any error—and there was not—we are convinced that it would have been harmless. Defendant contends that the court's various instructional errors barred him from presenting and arguing valid defense theories in violation of the federal Constitution, which was structural error requiring automatic reversal. We think not. The court instructed on self-defense and imperfect self-defense, and defense counsel argued self-defense at length to the jury. For instance, he told them: "We have multiple places throughout this interview where [defendant] discusses his belief that he was in imminent danger of being killed or suffering great bodily injury. He doesn't necessarily say those specific words, but he doesn't have to." And then: "[Defendant] says, 'I was afraid I was going to be knocked out, knocked unconscious, knocked out, take my gun.'"

Whether the standard for state law error or constitutional error applies is immaterial, because the error would not have been prejudicial under any standard. (*Chapman v. State of California* (1967) 386 U.S. 18, 24 [federal constitutional error is prejudicial unless it was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 837 [state law error is prejudicial if it is reasonably probable that the

defendant would have obtained a more favorable result without the error].) We are convinced beyond a reasonable doubt that no reasonable jury would have rejected defendant's theory that Thomas intended to take the gun and turn it against him, yet would have accepted that Thomas intended to merely take the gun through force or fear. As noted, there was no evidence at all to support that latter belief, and the instruction as given sufficiently encompassed the former belief.

We also conclude that there was no reversible error in omitting the optional language that defendant's belief may have been reasonable even if he relied on untrue information. The court reasoned that "information" for this purpose referred strictly to oral or written threats on which defendant might have relied. Defendant challenges this strict interpretation; he contends that the jury could have inferred that he relied on "his observation that [Thomas] was fighting off [Christopher] to get to him," and even if this observation was mistaken, it could have been objectively reasonable. The trial court correctly determined that there was no evidence of any untrue oral or written statements on which defendant might have relied. And, even if the term "information" covered defendant's perceptions, and not simply oral or written statements relayed to him, the instructions sufficiently covered his argument that he could have reasonably relied on a mistaken perception of Christopher's or Thomas's actions. The court instructed the jury: "When deciding whether the defendant's beliefs were reasonable, *consider all the circumstances as they were known to and appeared to the defendant* and consider what a reasonable person in a similar situation with similar knowledge would have believed. If

the defendant's beliefs were reasonable, *the danger does not need to have actually existed.*" (CALCRIM No. 505, italics added.) The court thus told the jurors to consider defendant's perception of the events, which would have included his view that Thomas wanted to harm him and was fighting Christopher's restraint attempts to get to him. The court also told the jurors that this could be a reasonable belief, even if the danger did not actually exist—in other words, even if defendant was mistaken about Thomas's motivations and the danger that he posed. The optional language about reliance on untrue information was therefore unnecessary, in this particular case.

3. Contrived Self-defense Instruction (CALCRIM No. 3472)

At the prosecution's request and over defendant's objection, the court instructed the jury with CALCRIM No. 3472, which states: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Defendant argues that this instruction precluded the jury from considering self-defense and was erroneous under *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*). His reliance on *Ramirez* is misplaced. The court did not err in giving this instruction.

Relatively recently, our Supreme Court explained that CALCRIM No. 3472's analog, CALJIC No. 5.55, is consistent with the law. (*People v. Enraca* (2012) 53 Cal.4th 735, 761.) That pattern instruction states: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (CALJIC No. 5.55.) "[T]he language of the two

instructions is materially the same. CALCRIM No. 3472 is therefore generally a correct statement of law." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333.)

Even the case on which defendant relies, *Ramirez*, recognized that "CALCRIM No. 3472 states a correct rule of law in appropriate circumstances." (*Ramirez*, *supra*, 233 Cal.App.4th at p. 947.) Thus, when the defendant contrives a deadly assault, the victim is fully entitled to use deadly force in response, and the defendant has no right to claim self-defense in that circumstance. (*Ibid.*) But *Ramirez* held that CALCRIM No. 3472 misstated the law under the particular facts of that case. (*Ramirez*, *supra*, at pp. 943, 945, 947.) Some evidence showed that the *Ramirez* defendant sought out rival gang members for a confrontation and fight, but not necessarily a deadly assault. (*Id.* at p. 944.) A fistfight did indeed break out. (*Ibid.*) The defendant had a gun on him, and when he thought that he saw one of the rivals approach him and draw a gun, he responded by fatally shooting the rival. (*Id.* at p. 945.) He claimed at trial that he acted in self-defense and in defense of his companions. (*Ibid.*)

On these facts, the *Ramirez* court concluded that CALCRIM No. 3472 misstated the law, because the instruction "made no allowance for an intent to use only nondeadly force and an adversary's sudden escalation to deadly violence." (*Ramirez*, *supra*, 233 Cal.App.4th at p. 945; see also *id.* at p. 950.) The prosecutor also highlighted the instruction in closing argument and claimed that it precluded any claim of self-defense, even if the defendant only intended to provoke a fistfight. (*Id.* at p. 946.) Between the categorical terms of the instruction barring *any* claim of self-defense when the defendant

contrived to use *any* force, and the prosecutor's forceful arguments to that effect, "the jury was misled on the law of self-defense." (*Id.* at p. 952.) That is, the *Ramirez* defendant would have been entitled to claim self-defense if he intended to provoke only a fistfight, and the victim was the one who introduced deadly force into the conflict. (See *id.* at p. 947.)

Ramirez is all well and good, but there is a critical distinguishing factor in this case: The court *did* instruct the jury on defendant's right to claim self-defense if Thomas escalated the conflict. This was in response to the jury's note about CALCRIM No. 571, the imperfect self-defense instruction discussed in part III.A.1., *ante*. The response addressed circumstances in which both imperfect self-defense and self-defense would be available to defendant. When the parties and the court discussed how the court should respond, defense counsel suggested that the court look at *Ramirez*. The court did so and added language to the supplemental instruction to address *Ramirez*. Specifically, the court instructed the jury: "Although the defendant may not have had the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force as described in CALCRIM [No.] 3472, or, if Mr. Thomas was legally justified in resorting to self-defense, *the defendant may defend himself with deadly force if Mr. Thomas escalated the quarrel with his use of deadly force or force likely to produce great bodily injury*. [¶] Please refer to all instructions as a whole, including CALCRIM [Nos.] 505 and 571, regarding self-defense and imperfect self-defense." (Italics added.) The

supplemental instruction thus expressly referenced CALCRIM No. 3472 and qualified its application, in the event that the jury determined Thomas escalated the conflict.

Before so instructing the jury, the court remarked to the parties: "I actually think what I'm doing inures more benefit to the defense than the People, because it eliminates what I think is possibly a fatal flaw in the earlier instructions by suggesting that just by provoking a quarrel the defendant would never have the opportunity to resort to deadly force. This clarifies it, actually expands the opportunity for the defendant to use deadly force."

As another court examining *Ramirez* has concluded, "CALCRIM No. 3472 is generally a correct statement of law, which might require modification in the rare case in which a defendant intended to provoke only a nondeadly confrontation and the victim responds with deadly force." (*People v. Eulian*, *supra*, 247 Cal.App.4th at p. 1334.) Such a modification essentially occurred here. Looking at the charge to the jury as a whole, if there was any error in giving CALCRIM No. 3472 alone, the court cured it with the supplemental instruction addressing the possibility that Thomas escalated the conflict. (*People v. Dieguez*, *supra*, 89 Cal.App.4th at pp. 276-277.)

4. Special Pinpoint Instructions on Alcohol Impairment and Witnesses Altering Evidence

Defendant's last instructional contention is that the court erred in rejecting two specially proposed pinpoint instructions, one prohibiting a presumption of impairment, and one on witnesses willfully altering evidence. We disagree.

(a) *Relevant Background*

The toxicologist who performed defendant's and Thomas's blood-alcohol tests testified that the blood-alcohol level "supposed for impaired driving" is 0.08 percent. Defendant's proposed pinpoint instruction on impairment stated: "You may not presume that any particular blood alcohol level causes a person to be impaired. You should judge a person's impairment, if any, on his behavior, including his statements and physical actions."

At the conference on jury instructions, the court noted: "[Y]ou're asking me to tell them what's not the law. Kind of unusual." The court further noted that the toxicologist had testified about "the legal limit," but had specifically related it to driving under the influence. Defense counsel argued that this instruction was necessary to prevent confusion, lest the jury think that ".08 applies across the board to all aspects." The court rejected the special instruction because it injected the court too much into the process, and it was the jurors' role to evaluate the evidence as they heard it. In closing, defense counsel argued that defendant was not alcohol impaired or intoxicated, and he did not exhibit the symptoms of intoxication set forth in the toxicologist's testimony, despite the officer's observation that defendant smelled of alcohol and the empty beer cans at defendant's home.

As to witnesses altering evidence, there was evidence that Christopher and Ruybal had moved Thomas's truck from the curb to the side of the house right after the shooting. For instance, Aaron's girlfriend, who also lived at the Walters' house, came outside after

she heard the gunshots; she noticed that Thomas's truck was no longer parked on the street but was on the side of the house, and another car had been moved to the spot on the street. Christopher seemed to remember moving the cars, but his memory of it was "shaky." He thought that he told Ruybal to move Thomas's truck so that defendant could not take any more pictures. He was trying to de-escalate the situation and thought that if he could move the object of the dispute from sight, it might calm everyone down. He remembered Ruybal handing him the keys to the truck, and getting out of the driver's seat after moving it, but he could not recall if he did this before or after the shooting. At the same time, he acknowledged that he was at Thomas's side during the whole incident and thus could not have moved the truck before the shooting. During his interview, defendant told officers that "[t]hey" moved Thomas's truck "up on the grass" and moved another car to the street.

Defendant proposed two alternate versions of an instruction on witnesses altering evidence. The first stated: "If you find that a witness willfully altered, concealed, or destroyed evidence in order to prevent its being used in this trial, you may consider that fact in determining what inferences to draw from the evidence and whether the witness who altered or concealed evidence is credible."

The second version stated: "If you find that a witness has engaged in misconduct, such as tampering with evidence to prevent it from being found by law enforcement, you may consider that fact in evaluating the credibility of the witness's testimony. The fact that a witness may have committed misconduct does not necessarily destroy or impair a

witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

The court rejected both versions of the special instruction because it intended to give CALCRIM No. 316 on witness credibility, and the instruction permitted defense counsel to argue that the witnesses had committed misconduct by altering evidence. As given, CALCRIM No. 316 stated: "If you find that a witness has committed misconduct, you may consider that fact in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." In ruling, the court explained: "I don't think . . . it's up to the Court to specifically direct the jury as to what the misconduct may be and to direct them as to moving items or willfully altering evidence is the type of misconduct from which they can draw such inferences as to a witness' credibility. I think the defense can argue that. And I think the instruction in [CALCRIM No.] 316 gives them at least some legal backing to that argument. [¶] . . . [¶] . . . It's up to you to argue. You're going to argue that moving the trucks was misconduct. People are going to argue moving the trucks wasn't. It's not up to me to tell the jury that it is or it isn't."

(b) *Analysis*

"A defendant is entitled to a pinpoint instruction, upon request, only when appropriate. [Citation.] 'Such instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi.'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) The court should give them so long as substantial evidence supports them; they correctly state the law; they are not argumentative, duplicative, or potentially confusing; and they do not merely highlight specific evidence the defendant wants the jurors to consider. (*People v. Hartsch* (2010) 49 Cal.4th 472, 500; *People v. Jo* (2017) 15 Cal.App.5th 1128, 1173-1174.) "In a proper instruction, '[what] is pinpointed is not specific evidence as such, but the *theory* of the defendant's case.'" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) "[A] defendant is not entitled to instructions that simply recite facts favorable to him." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159.) Moreover, "'the *effect* of certain facts on identified theories "is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate,"'" not jury instructions. (*People v. Roberts* (1992) 2 Cal.4th 271, 314, italics added.)

Defendant's proposed instruction on impairment and blood-alcohol level was not appropriate, given these principles. The effect of specific evidence of intoxication, such as blood-alcohol level, was best left to argument, and indeed defense counsel ably argued defendant was not intoxicated or impaired. By telling the jurors what they should *not* do with the blood-alcohol evidence—presume impairment—this proposed instruction was

argumentative and more akin to an inappropriate instruction that merely recited facts favorable to defendant. Furthermore, the instruction was potentially confusing. Defendant's blood-alcohol level was probative of whether he was intoxicated, even if no legal presumption arose from it. The jurors were not limited to considering only "his behavior," as the proposed instruction suggested. For these reasons, the court did not err in rejecting this instruction.

Nor did the court err in rejecting the two versions of the instruction on witnesses altering evidence. They were duplicative of CALCRIM No. 316, which already told the jurors that they could consider a witness's misconduct in evaluating his or her credibility. As the court aptly noted, the pattern instruction permitted counsel to freely argue that certain witnesses altered the crime scene when they moved cars and thus committed misconduct affecting their credibility. In addition, the proposed instructions simply emphasized the evidence that witnesses had altered the scene. Merely highlighting facts favorable to defendant was not an appropriate use of pinpoint instructions.

B. *Challenges to Evidentiary Rulings*

Defendant faults the court's rulings on several evidentiary issues. In particular, he argues that the court: (1) erroneously excluded evidence of Thomas's purported membership in a gang; (2) erroneously excluded evidence of Thomas's outstanding bench warrants for traffic-related offenses; (3) erroneously excluded cardboard cutouts depicting Thomas and defendant on the day of the shooting; and (4) erroneously admitted

evidence of defendant's blood-alcohol level. He claims that the cumulative effect of these errors amounted to a violation of his constitutional right to present a defense.

We review these rulings on the admissibility of evidence under the deferential abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) "The trial court's 'discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered.'" (*People ex rel. Lockyer v. Sun Pac. Farming Co.* (2000) 77 Cal.App.4th 619, 640.) With this standard in mind, we conclude the court did not err in any of these instances.

1. Expert Testimony on a White Supremacist Gang

Defendant argues that the court erred in excluding expert testimony about a White supremacist gang and Thomas's purported membership in the gang. He contends that this was admissible as character evidence (Evid. Code, § 1103, subd. (a)(1)) and was necessary to show why Thomas would "display explosive aggression over what the prosecution argued was such a trivial matter." We conclude that the court properly excluded this evidence.

(a) *Relevant Background*

Defendant's proffered gang expert, Richard Valdemar, is a retired Los Angeles County sheriff's sergeant. At a pretrial hearing, defendant argued that Valdemar's testimony was admissible character evidence under Evidence Code section 1103. According to him, Valdemar would educate the jury "about the types of organizations and people that are typically associated with" the "outward indicia presented by Mr.

Thomas," including his tattoos and social media. Valdemar had prepared a written declaration.

According to Valdemar's declaration, the Peckerwoods are a "White gang subculture[]" falling under the control of the Aryan Brotherhood prison gang. Peckerwoods exhibit White racial pride and stand with other Whites against other races. They often tattoo the name of the gang or images of woodpeckers on their bodies. Other common tattoos associated with them include Nazi-related symbols, such as the iron cross, a swastika, and phrases like "White pride." Such tattoos are badges of rank in the White gang subculture, and getting them would require the approval of gang leadership. Peckerwoods commonly express an anti-authority attitude. They are contemptuous toward law enforcement and anyone who would call the police on them or act as a witness against them. When challenged, they can be confrontational and violent, especially when challenged by a person of color, and especially when abusing alcohol or drugs. (Defense counsel asserted that defendant is Hispanic.) Valdemar indicated that he had reviewed various unspecified photographs and social media postings provided by the defense. He opined that Thomas's tattoos—two stylized woodpecker cartoons, an iron cross, and the phrase "White pride"—were consistent with membership in the Peckerwoods. He also opined that Thomas would have been required to "'stand up'" for his "younger brother 'Woods'" (Christopher and Ruybal) when defendant disrespected them.

Initially, the court ruled that it would permit Valdemar to opine on Thomas's character trait for violence, and he could base his opinion on social media postings that anyone in the community would be able to access. The court explained: "[E]ven a layperson can render an opinion as to whether somebody has a specific characteristic for violence just based upon things that person has done or said, bragged about, or otherwise espoused either personally or through social media." But the court ruled that Valdemar could not testify about the White supremacist gang or Thomas's membership in it. The court explained the limitation this way: "Racism in all its forms is abhorrent and it's an affront to any decent human being. And—but it does not follow that everyone who espouses racists views is violent. That's not logical. I think there's a personal visceral reaction that many people, if not most people in this country, now have when they see racist symbols that apparently Mr. Thomas displayed, whether a swastika, tattoo that says, 'White Pride,' and even a Confederate flag. I know it offends me to the core, as I'm sure everybody in this courtroom. [¶] But it is a leap that I'm not prepared to make that says those symbols in and of themselves attribute to one's propensity for violence, unless there is something that connects this particular person, Mr. Thomas, with specific acts of violence related to those symbols that somebody could base their opinion on. I'm hearing none. So it's fundamental to our sense of justice that a person should be held accountable for their own actions and not the actions of others." The court further explained that, even if Thomas's membership in the racially motivated gang had some limited relevance, the probative value of the evidence would be overwhelmed by its

prejudicial nature. It noted that Thomas's conduct on the night of the shooting provided "lots of other evidence" that he was a violent person. The court therefore excluded the gang evidence as irrelevant and more prejudicial than probative.

Later during trial, but before Valdemar could testify, the court changed its ruling allowing Valdemar to opine in a limited way on Thomas's propensity for violence. Instead, the court excluded his testimony altogether. It concluded that defendant had not established that Valdemar had sufficient knowledge of Thomas's character trait for violence or his reputation within the community for violence. The court found that the only basis for his knowledge was a single Facebook post from 2012 about a 2008 incident, in which Thomas posted a picture of himself with a black eye, and in the comment thread said, "[D]roppin punks like small pocks that night. Beat down about 14 [M]exicans then went out for dinner." The court noted that it was already admitting the post itself for the limited purpose of "showing Adam Thomas'[s] state of mind."

The parties later stipulated to the admission of two Facebook posts, including the one just discussed, for the limited purpose of showing Thomas's state of mind on the dates of the posts. The second post was also from 2012. It stated: "[P]oor mom has seen me beat down one too many times . . . that night it was just me and my bro against about 14-20 strangers at scotts [*sic*] party, me and my bro, back to back droppin these cats left and right. I would fall, he would pick me up, he would fall I would pick him up, we one that rumble, 2 against a dozen at once, shit was epic!!! aaawww the good ol days."

(b) *Analysis*

Generally, "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Evidence Code section 1103 sets forth an exception to this general rule. Among other things, it "authorizes the defense in a criminal case to offer evidence of the victim's character to prove his conduct at the time of the charged crime. . . . Consequently, in a prosecution for a homicide or an assaultive crime where self-defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor." (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446, fn. omitted.) Evidence of the victim's violent character may take "the form of an opinion, evidence of reputation, or evidence of specific instances of [violent] conduct." (Evid. Code, § 1103, subd. (a).)

The trial court has discretion to exclude any evidence, including otherwise admissible character evidence, "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Shoemaker*, *supra*, 135 Cal.App.3d at p. 448.) "'[How] much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*

(1980) 27 Cal.3d 303, 318, fn. 20.) "Evidence is prejudicial within the meaning of Evidence Code section 352 if it '"uniquely tends to evoke an emotional bias against a party as an individual"' [citation] or if it would cause the jury to '"'prejudg[e]' a person or cause on the basis of extraneous factors"' [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 475.)

Defendant suggests that Valdemar's anticipated testimony was admissible and relevant to show Thomas's violent character and that he acted in conformity with that character on the night of the shooting. But Valdemar's testimony did not qualify as proper character evidence. It was not evidence of "specific instances of [violent] conduct" by Thomas. (Evid. Code, § 1103, subd. (a).) And, he had no foundation to testify about whether Thomas had a violent reputation. (*Ibid.*) An individual who has known a person "for a reasonable length of time" or who knows the reputation of that person in the community may qualify to testify as to the person's character. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39 [officers who did not know child witness and were unaware of her reputation for honesty or veracity could not testify as to her character for these traits].) Put otherwise, a witness to a person's reputation "'must, at least, be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue.'" (*People v. Paisley* (1963) 214 Cal.App.2d 225, 233.) Valdemar did not claim to know Thomas or know his reputation. Rather, he claimed to know the reputation of the Peckerwoods gang. He was not qualified to speak about the reputation of Thomas the individual.

The same can be said about any opinion that Thomas was a violent person, to the extent that Valdemar intended to offer that opinion. (Evid. Code, § 1103, subd. (a).) Valdemar had no foundation for that opinion. Any such opinion had to be rationally based on Valdemar's own perceptions and observations of Thomas. (Evid. Code, § 800; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1307-1309 [court properly excluded opinion testimony that the defendant was "not a 'sexual deviant'" when it came to children, because the character witness had not personally observed the defendant's conduct with children].) But Valdemar claimed only to have reviewed some unspecified photographs and social media postings provided by the defense. His claimed field of expertise was gangs. He had no particular expertise in Thomas the individual. And he could not base any opinion that Thomas was violent on his claimed membership in the gang alone. (*People v. Memory* (2010) 182 Cal.App.4th 835, 859 ["'Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion.'"].) Yet that is precisely what Valdemar appeared poised to do.

Assuming for the sake of argument that social media postings could provide a foundation for an opinion on Thomas's violent character, the court admitted the Facebook comments and the black-eye picture, so any error in excluding an opinion based on these would be harmless. The jurors could see for themselves that Thomas valued his purported prowess for fighting and violence and thought that it was a subject worth bragging about in a public forum.

Moreover, to the extent that Thomas's gang membership was at all probative of his propensity for violence, the court did not abuse its discretion in finding the evidence substantially more prejudicial than probative. While gang evidence has become commonplace in many criminal trials, that is usually because the prosecution has charged the defendant with active participation in a criminal street gang (§ 186.22, subd. (a)) or alleged a gang enhancement (§ 186.22, subd. (b)). In these cases, the defendant's membership in a gang and information about the gang's culture are highly relevant. Obviously, this is not such a case. Thomas was not on trial and was not charged with actively participating in a gang or acting for the benefit of a gang.

Gang evidence may be relevant for other purposes, such as to show a motive or specific intent, but in cases not involving a gang charge or gang enhancement, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) "Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) "[E]ven where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193; see also *People v. Gomez* (2018) 6 Cal.5th 243, 294 [trial court should have excluded parts of gang expert's testimony that were more prejudicial than probative].)

Thus, the courts of this state have recognized that gang membership may improperly evoke an emotional bias against an individual. This case involved still another aspect likely to inflame the emotions of the jury—the gang's racist ideology. As the trial court put it, "[r]acism in all its forms is abhorrent and it's an affront to any decent human being," and many people have a negative "visceral reaction" to it. In light of Valdemar's lack of familiarity with Thomas the individual, the consequently low degree of probative value his testimony would have on that topic, and the inflammatory nature of the gang evidence, we cannot say that the court abused its discretion in excluding it. The court properly determined that there was a substantial danger the jurors would "'use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction.'"[4] (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

[4] Defendant bases a jury instruction challenge on this excluded evidence. One of his proposed pinpoint instructions stated: "You have heard testimony about Adam Thomas's propensity for aggression and violence. The purpose of such evidence is to show that it is probable that a person of such character acted in conformity with that character trait during the events leading up to the shooting in this case. You may consider that evidence to determine whether he likely behaved in an aggressive and violent manner on the night of the shooting. You may not consider that evidence as evidence he was a bad person." Defendant asserts that the court's refusal to give this instruction is "wholly subsumed by the errors relating to the court's evidentiary exclusions." Because we have rejected his argument that the court should have admitted the gang evidence, we likewise reject the derivative argument that the court should have given this pinpoint instruction.

2. Evidence of Outstanding Bench Warrants

Defendant next contends that the court should have admitted evidence of Thomas's outstanding traffic-related bench warrants to show a motive for Thomas to attack defendant. The court did not err in excluding this evidence.

(a) *Relevant Background*

Defendant sought to introduce evidence of five outstanding bench warrants that Thomas had at the time of his death (two in Washington and three in California). The court issued four of them after Thomas failed to appear on charges of driving with a suspended license or driving without a license. (Veh. Code, §§ 12500, subd. (a), 14601, subd. (a); Wash. Rev. Code, § 46.20.342(1)(c).) The court issued the fifth warrant after Thomas failed to appear in Washington on charges of driving under the influence (DUI) and driving with a suspended license. (Wash. Rev. Code, §§ 46.20.342(1)(c), 46.61.502.) The records relating to the DUI charge showed that the court had released defendant on his own recognizance, and his conditions of release included that he should not be using alcohol or drugs, should not be driving under the influence of either, and should not be driving without a valid license.

Defendant argued at trial that Thomas's bench warrants established a motive for Thomas's aggressive response to defendant. The court ruled that the evidence was not relevant. The court explained that it was not reasonable to infer that Thomas would have believed a border patrol agent was there exercising traffic enforcement, and the jurors would have to "speculate at the highest level" to conclude that Thomas's bench warrants

and the possibility of having his car impounded motivated him to be "extra aggressive" with defendant. The court thought that the evidence "add[ed] very little to his motivation to get into this altercation."

It moreover ruled that, even if there were some probative value to the evidence, the evidence was excluded under Evidence Code section 352, because the undue consumption of court time would substantially outweigh any probative value. The introduction of the warrants themselves would not take much time, but the prosecution would probably want to put on rebuttal evidence "to explain that nobody actually goes to jail on traffic warrants anymore. They just get another cite and get sent home. [¶] In fact, looking at these documents, somebody would likely have to testify that's what happened to Mr. Thomas." The prosecution would probably also want to show that, when these cite releases happened before, "[h]e did not get into a fight, and he actually was being cited and having a vehicle impounded. So why, in this occasion, would he act differently? It opens up a whole other set of issues that are so far away from the issue in this case . . . ." The court did not want to have a minitrial on whether Thomas was aware of the warrants, and "whether or not he would infer that he would be arrested under the circumstances by a border patrol agent in this context."

(b) *Analysis*

Evidence of a person's prior crimes, civil wrongs, or other misconduct is admissible to prove motive. (Evid. Code, § 1101, subd. (b).) Relying on this rule, defendant reasons that Thomas's outstanding warrants would have "heightened" his

motive to "aggressively confront" defendant, would have illuminated the root of Thomas's hostility toward defendant, and would have shown Thomas was trying to avoid possible arrest and seizure of his truck.

The court did not abuse its discretion in concluding this evidence was irrelevant and too time consuming. First, the evidence was not probative of motive because the inference that defendant seeks to draw from it is unreasonable. Relevant evidence must have a "tendency *in reason* to prove or disprove" a disputed fact. (Evid. Code, § 210, italics added.) The warrants would tend to show a reason to *avoid* law enforcement and *not* confront an officer, rather than a motive for confrontation. Second, to the extent that the warrants had minimal probative value, this value was substantially outweighed by the probability of undue consumption of time. (Evid. Code, § 352.) Admitting the warrants was not simply a matter of putting the papers before the jury. It would have required a witness to explain the meaning of the warrant paperwork to the jury. Then, as the court pointed out, the prosecution would likely want to present testimony on the cite and release process, and testimony to show that defendant was simply cited and released before, without getting into a confrontation with officers. The process would have devolved into a minitrial on how law enforcement would have acted on these warrants and defendant's probable reaction to the warrants. In an already very lengthy trial, the evidence did not justify this consumption of time. The court's decision was entirely within "'the bounds of reason, all of the circumstances being considered.'" (*People ex rel. Lockyer v. Sun Pac. Farming Co.*, *supra*, 77 Cal.App.4th at p. 640.)

3. The Cardboard Cutouts of Thomas and Defendant

Defendant argues that the court erroneously excluded two "life-size" cardboard cutouts of Thomas and defendant. The court did not abuse its discretion. There was an insufficient foundation for at least one of the cutouts, and in any event, both were cumulative and subject to exclusion for that reason.

(a) *Relevant Background*

Early in the trial, defense counsel advised the court that he wanted to use "two life-size cutouts," one of defendant and one of Thomas. Counsel represented that the cutout of defendant came from a photograph taken during his processing on the night of the shooting. He further explained that the cutout of Thomas came from a photograph on Thomas's cell phone, and the date stamp showed that it was taken approximately 10 hours before the shooting. Counsel argued that the exhibits were relevant and helpful to the jury in showing the relative size of the two men. The court indicated that it would allow the exhibits as evidence of the relative heights of the two men, assuming defendant laid a foundation for them. But defendant could not use them to show the men's girth or build, because the exhibits' two-dimensionality could not accurately represent that. The court reasoned that any question about whether the exhibits were "perfectly accurate" would go to the weight of the evidence.

During Christopher's cross-examination, defense counsel showed him the cutout of Thomas. (See fn. 3, *ante*.) Christopher said that he believed the cutout accurately depicted Thomas's clothing on the day of the shooting. Christopher had earlier estimated

that Thomas was five feet eight inches tall. He revised that and acknowledged that *if* the cutout was life-size, Thomas was taller than five feet eight inches.

Defense counsel showed another resident of the Walters' house, Michael Daniels, the cutout of Thomas. Daniels could not say if the cutout accurately represented all of Thomas's clothing on the night of the shooting. When the prosecutor asked on cross-examination if the cutout accurately represented Thomas's size, Daniels responded "[y]es," although he could not estimate Thomas's height and weight. He said only that Thomas was taller than him (Daniels is five feet five inches tall) and "had a few extra pounds."

Defendant told police during his interview that he was five feet six inches tall. Defendant's expert, Henry, testified to a physical description of both defendant and Thomas, including that defendant was five feet six inches tall and 195 pounds. He also used a slide presentation showing the same pictures of the men used for the cutouts. The forensic pathologist who conducted Thomas's autopsy concluded that he was five feet 10 inches tall and 193 pounds.

At the close of evidence, the court declined to admit the cutouts. It ruled that defendant had not laid a foundation "as to the actual sizes of each of those items in the presence of the jury." Even if the foundation were sufficient, the court concluded that the exhibits were misleading and not representative of the men's true sizes, insofar as their feet were not flat on the ground in the two-dimensional pictures. There was also "tons of evidence" in the record as to the relative heights and weights of defendant and Thomas.

The court determined that the potential for misleading the jury substantially outweighed the probative value of the evidence.

During deliberations, the jury sent a note asking the court "to bring us the life size cardboard cut outs." Defense counsel renewed his argument to admit them, urging that the exhibits need not be exact replicas to be admissible. The court agreed that they did not need to be exact replicas. Nonetheless, there needed to be a foundation for them, and there was no foundation that the cutouts were the "exact height" of each man. The court also reiterated its point that the exhibits were misleading because of their two-dimensionality. It described again how the men's feet were not flat on the ground in the cutouts and they appeared to be on tiptoe, "so it's misleading." The court also noted that the record disclosed other evidence of the men's relative heights and weights on the date in question, and it was "within the common realm of the jurors' thought process to relate a person who is four inches taller than the other, each being approximately the same weight, which is what the state of the evidence is." The court responded to the jury's note with this: "These items were not introduced as evidence and will not be provided."

(b) *Analysis*

Demonstrative evidence is a tool to aid the jury in understanding the substantive evidence. (*People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1036.) Demonstrative evidence "'that tends to prove a material issue or clarify the circumstances of the crime'" is generally admissible (*People v. Cavanaugh* (1955) 44 Cal.2d 252, 267), so long as the

proponent of the evidence lays a proper foundation for it (*People v. Rivera* (2011) 201 Cal.App.4th 353, 363).

The probative value of demonstrative evidence depends principally on its similarity to the events and conditions that existed at the time of the crime. (*People v. Rivera, supra,* 201 Cal.App.4th at p. 363.) "To be admissible, demonstrative evidence must satisfy two requirements: first the evidence must be a reasonable representation of that which it is alleged to portray; and second, the evidence must assist the jurors in their determination of the facts of the case, rather than serve to mislead them." (*Ibid.*)

With respect to photographs in particular, "[a] photograph is a 'writing' and '[a]uthentication of a writing is required before it may be received in evidence.'" (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514, quoting Evid. Code, §§ 250, 1401, subd. (a).) Authentication of a photograph requires a showing that it accurately depicts what it purportedly represents. (*People v. Chism* (2014) 58 Cal.4th 1266, 1304.) Anyone who knows that the photograph correctly depicts the subject may authenticate it. (*Ibid.*)

Here, the court did not err when it held that defendant lacked a foundation for his own cutout. No witness testimony or other evidence showed that the photograph used for the cutout depicted defendant on the day of the shooting, and no witness testified that the cutout reasonably represented his size on that day. Defendant contends that the jurors had evidence of defendant's height, and if they wanted to verify that the cutout was accurate, they could have easily done so "by simply using a standard 8½ inch by 11 inch sheet of paper as a ruler." This argument misses the point. The jurors would have had

access to the cutout only if the court had admitted it into evidence. Defendant had the burden of laying a foundation for the evidence before it could ever get to the jury. The jurors are not responsible for supplying a foundation for evidence, and they should not be conducting experiments in the jury deliberation room that involve them gathering new evidence not presented at trial. (*People v. Collins* (2010) 49 Cal.4th 175, 244.)

On the other hand, defendant established a foundation for Thomas's cutout. Christopher confirmed that the cutout showed Thomas as he was dressed on the day of the shooting. Daniels, who lived in the same house with Christopher and Thomas, testified that the cutout accurately represented Thomas's size. This sufficed to show that the photograph was truly Thomas, and that the cutout constituted a "reasonable representation" of his size. (*People v. Rivera*, *supra*, 201 Cal.App.4th at p. 363.) Evidence that the cutout was Thomas's exact height was not necessary for a sufficient foundation. As the court seemed to recognize early on, whether the cutouts were perfectly accurate would go to the weight of the evidence, not their admissibility.

Nevertheless, we affirm the court's ruling if it was correct on any legal ground (*People v. Geier* (2007) 41 Cal.4th 555, 582), and the court properly excluded both cutouts under Evidence Code section 352. This section allows trial courts to exclude cumulative evidence on the ground that its admission will necessitate undue consumption of time. (*People v. Burgener* (1986) 41 Cal.3d 505, 525, disapproved on another ground by *People v. Reyes* (1998) 19 Cal.4th 743, 756.) The cutouts were cumulative. Witness testimony and defendant's statements established defendant's and Thomas's height and

weight. They weighed roughly the same, and Thomas was four inches taller than defendant. We agree with the trial court that the jurors, through their everyday experiences, were perfectly capable of understanding and envisioning that size difference without the aid of demonstrative evidence.

4. Evidence of Defendant's Blood-alcohol Level

Defendant's last evidentiary contention is that the court erred in admitting evidence of his blood-alcohol level. The court ruled that this evidence was relevant to show how defendant acted during the confrontation and how he may have perceived things, and it was also probative of his credibility, to the extent that his blood-alcohol level was inconsistent with his statements to the officers about the number of beers he had consumed. The court did not err.

Evidence of voluntary intoxication is relevant and admissible to show whether a defendant "actually formed a required specific intent"—in this case, the unlawful intent to kill. (Pen. Code, § 29.4, subd. (b); *People v. Elmore* (2014) 59 Cal.4th 121, 132-133; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1297.) Defendant's blood-alcohol level was evidence of voluntary intoxication. It was thus relevant to whether he formed the specific intent to kill unlawfully. In addition, as the court noted, the evidence bore on defendant's credibility when telling his version of events to the officers. (Evid. Code, § 210 [relevant evidence includes "evidence relevant to the credibility of a witness or hearsay declarant . . . ."].) The evidence also bore on his capacity to perceive and recollect the events of the shooting and communicate about them. (Evid. Code, § 780,

subd. (c).) Accordingly, the jurors were entitled to decide whether a 0.13 blood-alcohol level five hours after the shooting was consistent with having consumed only two beers the night before; whether defendant's alcohol consumption affected his ability to perceive and recollect what was occurring during the altercation; and the effect that ability might have had on his statements to the officers. The court acted well within its discretion in admitting the blood-alcohol evidence.

Defendant argues that his blood-alcohol level was irrelevant because it could not give rise to any presumption that he was under the influence. The existence of a presumption was no threshold for relevance. Defendant's blood-alcohol level needed only to tend "in reason to prove or disprove [a] disputed fact that [was] of consequence to the determination of the action." (Evid. Code, § 210.) His voluntary intoxication, specific intent, and credibility supplied those material disputed facts.[5]

C. *Sufficiency of the Evidence That Defendant Did Not Act in Self-defense or Imperfect Self-defense*

The prosecution had the burden of proving beyond a reasonable doubt that defendant did not act in self-defense or imperfect self-defense. (*People v. Rios* (2000) 23 Cal.4th 450, 462; *People v. Banks* (1976) 67 Cal.App.3d 379, 384; CALCRIM Nos. 505,

[5] Defendant contends that the cumulative effect of the court's instructional and evidentiary errors deprived him of a fair trial, even if no single error did so. But we have rejected these claims of error, and there are thus no errors to cumulate. (*In re Reno* (2012) 55 Cal.4th 428, 483.)

571.) By finding defendant guilty of second degree murder, the jury impliedly found that the prosecution had carried this burden. Defendant challenges the sufficiency of the evidence underlying this finding. We are not persuaded and conclude substantial evidence supported the jury's finding.

In evaluating claims of insufficient evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Ibid.*) We must accept logical inferences that the jury might have drawn from the evidence, even if we might have concluded otherwise. (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) We neither reweigh the evidence nor reevaluate credibility in conducting our review. (*People v. Lindberg, supra,* at p. 27.) These tasks are the sole province of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

For a killing to be justified as self-defense, the defendant must actually and reasonably believe that he or she is in imminent danger of being killed or suffering great bodily harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The defendant must also reasonably believe that the immediate use of deadly force is necessary to defend against that danger, and must use no more force than is reasonably necessary. (*People v.*

Clark (1982) 130 Cal.App.3d 371, 380, disapproved on another ground by *People v. Blakeley* (2000) 23 Cal.4th 82, 92; CALCRIM No. 505.) Imperfect self-defense applies when the defendant subjectively believes that he or she is facing imminent death or great bodily injury, and subjectively believes that the immediate use of deadly force is necessary, but one or both of these beliefs is objectively unreasonable. (*People v. Humphrey*, *supra*, at p. 1082; *People v. Barton* (1995) 12 Cal.4th 186, 200; CALCRIM No. 571.)

The record reveals several grounds for the jurors to have reasonably rejected self-defense and imperfect self-defense. Before the whole confrontation began, defendant had been drinking and was outside his house with a shotgun because he heard a car doing burnouts. He took it upon himself to try to get the license plate number of the suspected truck and took a different gun with him. When he got to the Walters' house, he was hostile and insulting to Christopher and Ruybal, to the point that Ruybal was terrified. When Thomas joined the conversation, he used angry language and obscenities and walked toward defendant, and defendant backed up. But the evidence also showed that Thomas was not alone in being aggressive. According to Christopher, the two men engaged in back and forth talk, defendant also used obscenities, and there was back and forth movement. It was not just Thomas relentlessly bearing down on defendant. Christopher and Thomas turned around several times, and each time, defendant would take steps toward them, and the confrontation would continue. Christopher did not feel comfortable with their backs to defendant in that situation. Thomas was unarmed. He

had his hands down in front of him, did not attempt to strike defendant, and did not threaten to harm him. Defendant threatened to shoot Thomas if he came any closer, and then he drew his gun. Christopher tried to pull Thomas back from defendant, but Thomas shrugged him off and stumbled forward. Defendant opened fire. He shot at Thomas six times, and five made contact. Witnesses heard one series of shots, defendant say something like, "'Let's see you fight now,'" and then a second series of shots.

Reasonable jurors could have concluded from this evidence that defendant either unreasonably believed or did not actually believe Thomas posed a threat of death or great bodily injury, given that Thomas was unarmed, did not threaten defendant, and tried to turn around several times. Moreover, from defendant's mocking comment and the additional shots, the jurors could have reasonably inferred that defendant did not actually believe Thomas posed a deadly threat. If defendant wanted only to stop a threat, one series of shots should have been enough. The pause, mocking comment, and additional shots permitted an inference that defendant was acting out of anger, not an actual belief in the need for self-defense. These reasonable conclusions, that defendant unreasonably believed or did not actually believe that Thomas was a deadly threat, negated defendant's claims of self-defense and imperfect self-defense.

The jurors also could have reasonably concluded that defendant used more force than was necessary, especially if his judgment was impaired by his drinking, and he was angered by the reckless driving, the claimed effect his neighbors were having on the neighborhood, and Thomas's refusal to recognize his authority as a federal officer (who

seemed to believe that he did not need to explain his actions). This conclusion would have also negated defendant's claim of self-defense. (*People v. Clark, supra*, 130 Cal.App.3d at pp. 380-381 [sufficient evidence supported jury's implied finding that the defendant used more force than necessary, thereby negating his claim of self-defense].)

Defendant's briefing relies extensively on the evidence and the inferences supporting his claim of self-defense or imperfect self-defense, especially his own statements to officers, the testimony of his use-of-force expert, and the testimony of the expert on border patrol agent training. He also assails the credibility of Christopher and Ruybal. These methods do not persuade us. We do not suggest that there is no evidence supporting defendant's case for self-defense or imperfect self-defense. As we have said elsewhere, the evidence on many points was conflicting or disputed. We must not, however, "interject ourselves into the fact finding role." (*People v. Clark*, *supra*, 130 Cal.App.3d at p. 381.) "Issues arising out of self-defense [and imperfect self-defense], including whether the circumstances would cause a reasonable person to perceive the necessity of defense, whether the defendant actually acted out of defense of himself, and whether the force used was excessive, are normally questions of fact for the trier of fact to resolve." (*Id.* at p. 378.) We must accept the jury's reasonable inferences from the record, even if we might have chosen opposing ones. Much the same may be said about witness credibility. We must accept the jury's implied credibility determinations. And, the testimony of even one witness is sufficient to sustain a jury's verdict, so long as the testimony is not inherently improbable or physically impossible. (*People v. Watts* (1999)

76 Cal.App.4th 1250, 1259.) There was nothing inherently improbable or physically impossible about Christopher's or Ruybal's testimony. Any inconsistencies in their testimony raised evidentiary issues for the jurors to resolve. (*Ibid.*)

Ultimately, the jurors resolved the evidentiary issues in favor of the prosecution on self-defense and imperfect self-defense. Because substantial evidence supported their resolution, we will not disturb it.

D. *Remand for Resentencing on the Firearm Enhancement*

As we noted in part I, the jury found that defendant had personally and intentionally discharged a firearm, proximately causing Thomas's death. Under section 12022.53, the court sentenced him to prison for 25 years to life based on this enhancement. (§ 12022.53, subds. (a), (d).) Defendant's final contention is that he should benefit retroactively from recent amendments to section 12022.53, and we must therefore remand for resentencing on the enhancement. The People concede the point. We agree and remand for resentencing.

At the time of defendant's sentencing in March 2017, the court had no power to strike the firearm enhancement. (Former § 12022.53, subd. (h).) Effective January 1, 2018, the trial courts now have discretion to strike section 12022.53 firearm enhancements. (§ 12022.53, subd. (h); *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506.) The discretion to strike the enhancements may be exercised as to any defendant whose conviction is not final as of the effective date. (*People v. Arredondo*, *supra*, at pp. 506-507.) Defendant's conviction falls into that category. Accordingly, on remand, the

court must determine whether to strike the section 12022.53 enhancement under the current version of section 12022.53, subdivision (h).

IV. DISPOSITION

The court's imposition of the firearm enhancement under section 12022.53, subdivision (d) is reversed and the matter is remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h). In all other respects, the judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.